PERAGANATHAN A/L KARPAYA

v.

CHOONG YUK SANG & ANOR.

HIGH COURT MALAYA, IPOH
TUAN CHIN FOOK YEN JC
[CIVIL SUIT NO. 25-56-87]
3 JULY 1995

TORT: *Negligence - Collision between motorcycle and motorlorry from opposite directions - Conflicting versions - Evidence on point of impact non-conclusive - Whether liability should be equally apportioned - Quantum of damages - Whether expenses incurred in private hospital claimable - Nursing care - Loss of past and future earnings.*

The plaintiff claimed damages for personal injury suffered as a result of a collision between his motorcycle and the 1st defendant's motorlorry which was driven by the 2nd defendant at the material time.

According to the plaintiff, he was riding his motorcycle on his correct side of the road from Kampar to Teluk Intan when the 2nd defendant's motorlorry from the opposite direction overtook the car in front of it, encroached onto his side of the road and knocked into his motorcycle afterwhich the said lorry cut back onto its lane. The 2nd defendant's version was that when his motorlorry and an on-coming motorlorry were about to reach each other, the plaintiff's motorcycle emerged from behind the on-coming lorry in an attempt to overtake it and collided into his motorlorry despite his attempts to brake and swerve to avoid the plaintiff. The damage to the front rim of the motorcycle and the off-side rear tyre of the motorlorry appeared to be the point of impact but were consistent with both versions of how the accident occurred. The sketch plan and key also held no clues to assist the Court in ascertaining the actual point of impact and only showed the vehicles appearing on their correct sides of the road.

The plaintiff's claim for expenses incurred at Hospital Fatimah, a private hospital, was disputed with the defendants contending that the plaintiff should have mitigated his loss by remaining at Teluk Intan District Hospital. The plaintiff claimed that he was unconscious after the accident and was thus unaware of the transfer. It transpired that the plaintiff's father arranged for the transfer to Hospital Fatimah after being informed that the plaintiff's leg was to be amputated and his request for a transfer to Ipoh General Hospital was turned down.

The main issues were whether liability should be equally apportioned in view of the conflicting versions and whether hospital expenses were claimable.

Held:

[1] In the instant case, the Court is left in doubt as to how or where the accident occurred on the road. Accordingly, the principle in *Baker v. Harborough Industrial Co-operative Society* [1953] 1 WLR 1472 applies to this case and the parties are equally to be blamed.

[2] When the Court is called upon to determine whether or not the expenses incurred in a private hospital should be allowed in such cases, it should not rely on medical advice solely as such, but whether in the circumstances of this case, the hospital concerned is ready and able to provide adequate facilities, expertise and treatment to the patient. In the instant case, it turned out that there was no necessity to have the plaintiff's leg amputated and the plaintiff had not produced any evidence to satisfy the Court that the state of affairs existed in Teluk Intan District Hospital then to give rise to such apprehension. Therefore the claim of RM11,629.90 is reduced to RM4,000.

[3] The Court awarded RM200 p.m., calculated from the date of the accident, for nursing care as the plaintiff who worked as a manual labourer in a factory resumed working in a light job and loss of earnings as agreed by the parties at RM500 p.m. as full earnings and RM250 p.m. as partial earnings at an agreed multiplier of 16 with the usual rate of interests and costs to the plaintiff.

[Plaintiff 50% liable. Damages awarded accordingly].

Cases referred to:
Noorianti bt. Zainol Abidin v. Tang Lei Nge [1990] 2 MLJ 242 ***(refd)***
Baker v. Market Harborough Industrial Co-operative Society [1953] 1 WLR 1472 ***(foll)***
Howard v. Bemrose ***(refd)***
Harcharan Singh a/l Saudagar Singh v. Hassan b. Ariffin [1990] 2 CLJ 393 ***(refd)***
Tang Kia Bak v. Mooi Kim Ming & Anor (Supreme Court Civil Appeal No. 249 of 1987) ***(refd)***
Tajuddin b. Sheikh Daud v. Wong Kim Yin [1989] 2 CLJ 237 ***(dist)***

For the plaintiff - M/s. R.J. Esa & Co.
For the defendant - M/s. Ng Chee Kong & Co.

JUDGMENT

Chin Fook Yen JC:

On 29 January 1985, an accident occurred between a motor cycle ridden by the plaintiff and a motor lorry owned by the 1st defendant and driven by the 2nd defendant.

There were two totally opposite versions of the manner in which the accident took place.

According to the plaintiff, he was riding the motorcycle on his correct side of the road from the direction of Kampar to the direction of Teluk Intan, there were no vehicles travelling in the same direction ahead of him, but there was a car travelling from the opposite direction behind which car was the 2nd defendant's motorlorry. The plaintiff said that the defendant's lorry overtook the car and encroached onto his side of the road and knocked into him. When the accident occurred the said lorry cut back into its lane after overtaking the car. The front rim of the plaintiff's motorcycle buckled in.

On the other hand, the 2nd defendant said that when his motorlorry and an on-coming lorry were about to reach each other, suddenly the plaintiff's motor cycle emerged from behind the on-coming lorry and attempted to overtake the said on-coming lorry. The 2nd defendant braked and swerved to the left in trying to avoid the plaintiff motorcycle. The damage to the 2nd defendant's motorlorry was at the off-side rear tyre.

In the case of *Noorianti bt. Zainol Abidin v. Tang Lei Nge* [1990] 2 MLJ 242 it was said "that a trial Judge should not approach the case upon the basis of deciding which of the two conflicting stories he should believe but rather on the basis of considering which version is inherently probable or improbable."

There were no visible damages or marks on the vehicles, other than the front rim of the motorcycle and the off-side rear tyre of the motorlorry, as said earlier. It would appear that that was the point of impact between the two vehicles. The rim being buckled in, would appear to have hit, not grazed, against, the off-side rear tyre of the motorlorry at some angle. This would be consistent with both the contentions of the manner in which the accident occurred. If the 2nd defendant's motorlorry was overtaking the motor car in front of it, the motorlorry would have swung out the rear portion, as it was cutting back into its correct lane (as was the version of the plaintiff). The position of the motorlorry would be at an angle across and not parallel to the road, resulting in the off-side rear portion offending the plaintiff's path. This would have caused the damage to the rim, when the motorcycle hit the tyre. On the other hand, if the plaintiff swerved to the right in order to overtake the motorlorry in front of him (as was the version of the 2nd defendant) the same damage would have been caused to the rim.

The sketch plan and the keys thereto could not offer any clue which would provide some objective evidence one way or the other. The point of impact in relation to the road indicated by the 2nd defendant to the police and the place where the plaintiff's motorcycle was found, both of them appeared on their respective correct sides of the road. There were no other marks such

as brake marks, fragments of broken glass, blood stains, anything at all to throw a clue or two of where, in relation to the road, was the point of impact.

I cannot find any evidence as to the respective positions of the two vehicles on the road immediately before or how they collided into each other. Counsel for the defendants submitted that, bearing in mind the two conflicting versions, and in the absence of any objective evidence liability should be apportioned equally.

In the case of *Baker v. Market Harborough Industrial Co-operative Society* [1953] 1 WLR 1472 the principle is stated in the head-note which reads as follows:

> Where the evidence established that a collision between two motor vehicles proceeding in opposite directions occurred in the centre of a straight road during the hours of darkness when both drivers were killed, the inference, in the absence of any other evidence enabling the Court to draw a distinction between them, was that each driver was committing almost the same acts of negligence - failing to keep a proper lookout and to drive his vehicle on the correct side of the road - and accordingly both were equally to blame.

In *Howard v. Bemrose* at p. 38, Buckley LJ summarized the principle as follows:

> The principle of (*Baker's* case) is that when, after all available evidence has been heard, it is clear that on the balance of probabilities there has been negligence on the part of somebody but when, on that evidence, and again on the balance of probabilities, the Court is unable to say whether the negligence is that of one party or the other, or of both parties, then it is open to the Court - once again on the balance of probabilities to say that the negligence was the negligence of both parties, and then, being without further information enabling the Court to apportion the blame, the Court will conclude that the parties contributed equally to the accident.

In the instant case, I am left in doubt as to how or where the accident occurred on the road. I accordingly find that the principle in *Baker's* case applies to this case. I find both the parties contributed equally to the accident and each party is 50% to blame.

I shall now deal with the issue of quantum based on 100% liability.

The general damages and most of the special damages were agreed leaving only the following items of special damages to be determined:

Item 6: Cost of private medical treatment at Hospital Fatimah & X-ray.

Although it has been agreed that a sum of RM11,629.90 was expended by the plaintiff, the area of dispute is whether the plaintiff was entitled to the expenses incurred at a private hospital, in the instant case Hospital Fatimah (a non-government mission hospital).

According to the plaintiff, he lost consciousness on impact. On regaining consciousness he was already in Hospital Fatimah (H/F). He was totally unaware that he was transferred from Teluk Intan District Hospital (T/I Dt. Hosp). PW2, the father said under cross-examination that he was informed by a ward doctor on the 4th day of admission that the plaintiff's leg was to be amputated. He continued to say that he "asked for transfer to Ipoh General Hospital, but (he) was told it cannot be done." It transpired that the plaintiff was transferred to H/F through an arrangement made by PW2.

Counsel for the defendants contended that the plaintiff should have mitigated his loss by remaining at T/I Dt. Hosp. citing in support of his argument the case of *Harcharan Singh a/l Saudagar Singh v. Hassan b. Ariffin* [1990] 2 CLJ 393 at p. 39b where the learned trial Judge followed the decision in *Tang Kia Bak v. Mooi Kim Ming & Anor.* (Supreme Court Civil Appeal No. 249 of 1987) where "the plaintiff has transferred himself from the General Hospital to a private hospital on his own accord" and accordingly the award was reduced to only one-third of the amount claimed.

I am aware of another case of *Tajuddin b. Sheikh Daud v. Wong Kim Yin* [1889] 2 CLJ 237 where the plaintiff had moved from the General Hospital, said to be against medical advice, to F/H Ipoh. The Court found as of fact that there was a shortage of doctors in the General Hospital to cope with the demanding situation existing at that time. The claim of the expenses incurred for treatment in H/F was allowed. Against this judgment there was an appeal which was dismissed.

It is my opinion that when the Court is called upon to determine whether or not the expenses incurred in a private hospital should be allowed in such cases, it should not rely on medical advice solely as such, but whether in this particular circumstances of the case, the hospital concerned is ready and able to provide adequate facilities, expertise and treatment to the patient. In this connection, Dr. Awtar Singh (DW2) testified "There is nothing in the records to indicate that the (plaintiff's) leg was to be amputated. If such advice was given it would be recorded in the medical records. In normal cases, where the District Hospital cannot handle the case, it will be referred to General Hospital Ipoh, as the latter has a Resident Orthopaedic Surgeon." In the instant case, it turned out that there was no necessity to have the plaintiff's leg amputated. The plaintiff had not produced any evidence to satisfy the Court that the state of affairs existed in T/I Dt. Hosp. then to give rise to such apprehension. The case of *Tajuddin* and this case are distinguishable. The claim of RM11,629.90 is therefore reduced to RM4,000 (round figure).

Item 9 - Nursing care at RM200 per month and still continuing.

When Dr. K. Raveendran examined the plaintiff on 18 July 1986 (17½ months from the date of accident on 29 January 1985), he observed that the plaintiff worked as a manual labourer in a factory. **"Now he is working in a light**

job in the same factory." I find there was evidence that the plaintiff resumed working in light job from 18 July 1986. I also feel RM200 p.m. for nursing care was not excessive. I therefore allow under this item a sum of (200 x 17½) RM3,500.

Item 10 - Loss of past and future earnings.

Both the parties by consent agreed and fixed the earnings of the plaintiff at RM500 p.m. as full earnings and at RM250 p.m. being partial loss of earnings. The plaintiff was 21 years old at the time when he was injured. The multiplier was also agreed at 16.

Counsel for the plaintiff urged the Court to assess total loss of earnings for 5 years i.e. from 29 January 1985 to January 1990. I am unable to accept, as the evidence of Dr. K. Raveendran the plaintiff's own Consultant in his report stated clearly to the effect that the plaintiff "is working" as at 18 July 1986, but in "light job". Accordingly I shall allow (500 x 17½ i.e. from 29 January 1985 to 18 July 1986) RM8,750 being pre-trial total loss.

As from 18 July 1986 I shall award partial pre-trial loss at (250 x 107 i.e. from 18 July 1986 to 3 July 1995) RM26,750.

As from 3 July 1995 (date of judgment) I award (250 x 67½ being balance of years purchase), I award RM16,875 being post-trial loss with no interest.

I also award the usual rates of interest at 8% p.a. on general damages and 4% p.a. on special damages. Thereafter at 8% p.a. on judgment debt.

Costs to the plaintiff.